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NEW BARGAINING ORDER: HOW AND WHY PROFESSIONAL WRESTLERS IN THE WWE SHOULD UNIONIZE UNDER THE NATIONAL LABOR RELATIONS ACT

GEOFF ESTES*

I. INTRODUCTION

In May of 1999, the WWE, then known as the WWF, had a storyline play out on their weekly episodic live television show, Monday Night RAW. It concerned the wrestlers staging a labor uprising in an attempt to be able to unionize.¹ While this was a ploy by the WWE to cast the “faces” (“the good guys”) as blue-collar, hard-working performers whom were constantly being held down unfairly by the “heels” (“the bad guys”) in the corporation, it introduced to the WWE audience a very real issue concerning the health and well-being of WWE wrestlers.² Although this was a “work,” meaning a scripted promo, it was also a window into tensions and feelings that were very real backstage at WWE events. “The Union’s goal wasn’t just to settle a[n] [on-screen] fight, but also to keep its members’ jobs.”³ Each group of on-screen talent, including “the good guys, the bad guys, the female wrestlers, [and] the referees . . . explained that they felt their workplace [was] unsafe” under the

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1. *The Union Debuts: Raw, May 3, 1999*, WWE NETWORK, <https://www.wwe.com/videos/the-union-debuts-raw-may-3-1999> (last visited Dec. 13, 2018).

2. *The Union | Pro Wrestling*, FANDOM, http://prowrestling.wikia.com/wiki/The_Union (last visited Dec. 13, 2018).

3. David Shoemaker, *On WWE and Organized Labor*, GRANTLAND (July 18, 2012), <http://grantland.com/features/wwe-hell-cell-john-cena-history-wrestling-real-scripted-labor-movement/>.

control of on-screen CEO Triple H who is the real-life son-in-law of WWE owner Vince McMahon.⁴

WWE wrestlers, and professional wrestlers in general, compete and work in a business that is dominated by one company with smaller companies serving as landing spots for the unfortunate wrestlers who do not have a spot on the WWE roster. The wrestlers put their bodies and overall health at risk on a nightly basis, all while not being allowed, by the figures in charge, to unionize. Although some wrestlers have advocated for unionization⁵ as a way to guarantee job security and to achieve better health care benefits that are currently paid out of their own pocket, these views are often not shared publicly until after discontinuing their wrestling careers. This silence is often due to fear of losing their jobs, or as a way to not lose the opportunity of job advancement by butting heads with some of the bigger names in the company.⁶

Professional Wrestling is not a territorial business as it used to be, and is now centered in one major company, the WWE, and a few minor promotions. Therefore, the professional wrestlers, both in the WWE and elsewhere, are now much more similar to employees than independent contractors, as defined by the National Labor Relations Act, which would allow them to organize a union and collectively bargain over mandatory subjects of collective bargaining with the employer, the WWE.

Due to the definition of “employees” in Section 2(3) of the National Labor Relations Act (NLRA), wrestlers are employees of wrestling companies, namely the WWE, and should unionize.⁷ The WWE cannot prevent their employees from unionizing without committing an unfair labor practice under Section 8 of the NLRA.⁸

This Article will explore how professional wrestlers could unionize, and why it would be to their benefit to unionize. It will begin with background information on the professional wrestling industry, including a brief history of the territorial era and the evolution to the WWE-dominated industry that it is today. This Article will then examine selected portions of the NLRA, which governs labor relations in the United States. Finally, the Article will conclude by applying the NLRA to the wrestling business, and how professional wrestlers

4. *Id.*

5. Jim Varsallone, *PRO WRESTLING: Unions Not Good for WWE Fans, Addressing CM Punk's Pro-Union Stance on Colt Cabana's 'The Art of WRESTLING' Podcast*, MIAMI HERALD, Dec. 1, 2014, <https://www.miamiherald.com/sports/fighting/article4206501.html>.

6. Stephen Sonneveld, *Why WWE, Pro Wrestlers Should Form a Professional Wrestling Union*, BLEACHER REP. (Mar. 19, 2012), <https://bleacherreport.com/articles/1110575-wwc-news-wrestlings-risks-warrant-a-labor-unions-rewards>.

7. National Labor Relations Act § 2(3) [29 U.S.C. § 152(3)] (2018).

8. *Id.* § 8(a)(1) [158(a)(1)].

could use the NRLA to form a union and force the WWE to bargain collectively with the wrestlers over certain mandatory issues of collective bargaining.

II. THE PROFESSIONAL WRESTLING BUSINESS: FROM TERRITORIAL TO CENTERED

A. The Early Years

Professional wrestling has been around for over 100 years. The popularity of wrestling has waxed and waned over the years, but it has been, for the most part, very popular to American consumers.⁹ In the early half of the twentieth century, wrestling was popular enough to support many local or regional promotions spread throughout the United States and Canada.¹⁰ Local federations had their own writers, promoters, and even heavyweight champions.¹¹

Wrestlers would drop into different territories for a month or more, run through their storyline, and then move on to the next territory to wrestle in front of a different group of fans.¹² The competing promotions had an unspoken sort of agreement to work with each other while still trying to secure the biggest draws for their own promotions, and they called it the “National Wrestling Association,” which was a spin-off of the National Boxing Association.¹³

This began to change in 1948 in Waterloo, Iowa.¹⁴ On July 18, 1948, the pro wrestling “dons” met in a hotel room and created what they called the “National Wrestling Alliance” (NWA).¹⁵ Each region would cooperate and “share” a world champion, who would travel to the different regions.¹⁶ They did this because at that point in time, they were all having issues retaining their talent and avoiding bidding wars with other promotions.¹⁷

The promoters knew they could make money “if they agreed to share their headliners, unite around a single champion, fix the wage scales, and blacklist

9. DAVID SHOEMAKER, *THE SQUARED CIRCLE: LIFE, DEATH AND PROFESSIONAL WRESTLING* 35 (Penguin Group ed., 2013).

10. *Id.*

11. *Id.* at 35-36.

12. *Id.* at 36-37.

13. *Id.* at 35.

14. *Id.*

15. *Id.*

16. *Id.* at 35, 37.

17. SHAUN ASSAEL & MIKE MOONEYHAM, *SEX, LIES, AND HEADLOCKS: THE REAL STORY OF VINCE MCMAHON AND THE WORLD WRESTLING FEDERATION* 8 (Crown Publishers ed., 2002).

any wrestler who refused to toe the line.”¹⁸ This was likely a clear violation of the Sherman Antitrust Act of 1890, but the promoters knew they could get away with it, so they started the NWA and the territorial era of wrestling was at an all-time high.¹⁹

The NWA was successful and thriving until around 1963 when Vince McMahon Sr. decided to rock the boat.²⁰ McMahon’s World Wide Wrestling Federation (WWWF), the early version of the current WWE, was dominating the northeastern corridor of New York, Boston and Washington D.C.²¹ McMahon did not want to share his champion any longer, who was the world famous “Nature Boy” Buddy Rogers, and he christened him the first “national” champion, making the other promotions world champions look weak in comparison, and making the first move to grasp greater power.²²

The NWA continued to operate, but after McMahon and his East Coast giant decided to leave the agreement, the “Territorial Era’s death warrant had been signed.”²³ It was nearly impossible for them to compete with the goliath in the east that was signing the biggest stars in the business and selling them as the national champions.²⁴

Besides the secession of the WWWF from the NWA, the other factor that spelled out the demise of the Territorial Era was cable TV.²⁵ Territories could no longer bill a different star and someone coming into their territory exclusively when the audience had seen him on TV the previous week wrestling for another promotion, possibly with a whole other gimmick as a different character, or even as a fan favorite instead of a heel.²⁶

Vince K. McMahon had taken over operations of the WWF (they had by now dropped the extra “W”) and set his sights on domination.²⁷ This vision became reality around the mid-80’s. McMahon began to assert dominance in the business by expanding worldwide and signing famous wrestlers to contracts to work exclusively for the WWF.²⁸ Then, he took a huge risk by promoting

18. *Id.*

19. *Id.*

20. SHOEMAKER, *supra* note 9, at 42-43. Vince McMahon Sr. is not the Vince K. McMahon who is the current owner of the WWE, but rather his father. *Id.*

21. *Id.* at 43.

22. *Id.* at 41-43.

23. *Id.* at 43.

24. *Id.*

25. *Id.*

26. *Id.* at 43-44.

27. *Id.* at 45.

28. *Id.* at 45.

the biggest wrestling show ever: WrestleMania. WrestleMania was a pay-per-view extravaganza, held at the world-famous Madison Square Garden and shown throughout the nation on big screens in cinemas.²⁹ It featured Hulk Hogan, Mr. T, Mr. Wonderful, and Rowdy Roddy Piper in the main event.³⁰ WrestleMania was a glowing success, bridging the gap between sports and entertainment pop culture by bringing in celebrities such as Cyndi Lauper, Muhammad Ali, and Liberace, among others, to add to the spectacle.³¹ The popularity of the WWF took off and never quite looked back. WWF was now the dominant wrestling promotion in the country, leaving the other promotions battling to keep their stars and keep fans walking in their doors.

Although they did have some competition in the late 90's and early 2000's, they eventually bought out their main competition, World Championship Wrestling (WCW) owned by TV mogul Ted Turner.³² This period was known as the Monday Night Wars, as the WWF and WCW went head-to-head every Monday night for ratings supremacy, until WWF finally won the "war" and was the only promotion left standing.³³ There was an extreme promotion in Philadelphia known as Extreme Championship Wrestling (ECW), but the WWF eventually purchased that promotion too, absorbing all of their stars. By doing this, they also limited options for wrestlers to make a living.³⁴ It was wrestle for the WWF or go on the independents and hope to make ends meet.

B. WWE Today

Today, the WWE, formerly the WWF (they changed their name in 2002 to avoid confusion with the World Wildlife Federation)³⁵ is a publicly traded corporation on the New York Stock Exchange.³⁶ It is an "integrated media and entertainment company[,] principally engaged in the development, promotion and marketing of television programming, pay-per-view programming and live arena events."³⁷ They also license and sell branded consumer products featuring

29. *List of WWE Pay-Per-View Events*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_WWE_pay-per-view_events#1980s (last visited Dec. 13, 2018).

30. *Id.*

31. *WrestleMania I*, WIKIPEDIA, https://en.wikipedia.org/wiki/WrestleMania_I (last visited Dec. 13, 2018).

32. SHOEMAKER, *supra* note 9, at 47.

33. *Id.* at 271-72.

34. *Id.* at 268-69.

35. *Id.* at 271.

36. *Patterson v. World Wrestling Entm't, Inc.*, No. 03-C-0374, 2006 U.S. Dist. LEXIS 7453, at *13 (E.D. Wis. Jan. 31, 2006).

37. *Id.*

the “World Wrestling Entertainment” brand and have become an “international media conglomerate that is a leading provider of family entertainment.”³⁸

Other promotions do still exist. Impact Wrestling, Ring of Honor, and New Japan, are all different professional wrestling promotions that have the ability to draw crowds and have an internet or TV presence, but they do not come close to the prominence and popularity of the WWE.³⁹ The WWE now has their own streaming network and five hours of live television per week on the USA Network that regularly draws in millions of viewers.⁴⁰ They have an extremely popular YouTube channel that generates millions of views as well, and a large presence on every social media platform.⁴¹

WWE is the largest provider of pay-per-view revenue in the world.⁴² WWE also has sold millions of video games and books written by WWE wrestlers under the WWE brand.⁴³ Merchandise bearing the WWE brand is sold online, as well as through national retailers such as Wal-Mart, Target, and Toys R Us.⁴⁴ It appeals to consumers nationwide and has fans of every age and demographic.

Most of this merchandising doesn’t only feature the WWE logo, but also the “characters’ names, likenesses, signature phrases as well as depicting WWE’s programming.”⁴⁵ In a court case, the WWE described its current programming as “[a]ction-packed episodic drama . . . akin to an ongoing, ever-developing soap opera.”⁴⁶ However, if it were a soap opera, it would be subject to the limitations placed on productions by the Screen Actors Guild (SAG), which represents actors. Yet, the WWE, whether considered professional athletes, actors, or a mixture of both, have no unionization and never have.

C. Why Haven’t Wrestlers Unionized Already?

Jesse Ventura, former professional wrestler and governor of Minnesota once said “How are they self-employe[es] when you’re signed exclusively, you can’t work for nobody else, they tell you when and where you’ll work? They can totally control your life, and yet they’ll call you an independent

38. *Id.* at *13-14.

39. Telephone Interview with Chris Estes, Host, HeelTown Podcast (Mar. 3, 2018).

40. *Id.*

41. *Id.*

42. *Patterson*, 2006 U.S. Dist. LEXIS 7453, *14.

43. *Id.*

44. *Id.* at *14-15.

45. *World Wrestling Fed’n. Entm’t, Inc. v. Big Dog Holdings, Inc.*, 280 F. Supp. 2d 413, 417 (W.D. Pa. 2003).

46. *Id.*

contractor?”⁴⁷ Ventura did try to organize a union in the 1980’s but had trouble finding wrestlers to join.⁴⁸ As a consequence, the wrestling industry “has never seen – nor permitted – any form of unionization by the talent.”⁴⁹ Ventura claims that this is because the WWE does not want to pay the social security tax and a 15% self-employment tax, and would rather leave all of the extra expenses to the wrestlers themselves.⁵⁰

Ventura detailed his efforts in his 1999 book, claiming he attempted to get King Kong Bundy, who was scheduled to wrestle Hulk Hogan in the main event of Wrestlemania II, to refuse to wrestle until they were allowed to unionize.⁵¹ If Bundy would have went along with this, since he was one half of the main event and being billed as the mammoth foil to Hogan’s hero, it would have been difficult for McMahon to refuse. However, Ventura later found out that Hulk Hogan had told Vince McMahon about the efforts, which scared any other performer from attempting to join the movement.⁵² Ventura never forgot this slight, claiming that “[a]ll through your wrestling career, remember, you’re an independent contractor. You’re paying out an enormous amount in taxes. There’s no pension, no health benefits. And the moment you’re not making that draw, the promoters could care less about you. You’re a piece of meat.”⁵³

But in recent years, more and more people outside of the business, or those who have left the business, have been calling for unionization. One prominent writer, David Shoemaker, who has worked with the WWE on an Andre the Giant documentary, said that “the wrestlers they employ are not ‘independent contractors’ any more than LeBron James or Peyton Manning are independent contractors”⁵⁴ In fact, in 2008, three wrestlers – Raven, Kanyon, and Mike Sanders – sued the WWE claiming that the independent contractor designation was a sham and that there were entitled to additional benefits.⁵⁵ This case was thrown out, and at least one of the wrestlers, Raven, was essentially blackballed by the industry.⁵⁶

47. Shoemaker, *supra* note 3.

48. JESSE VENTURA, I AIN’T GOT TIME TO BLEED 106 (Villard Books ed., 1999).

49. Shoemaker, *supra* note 3.

50. *Id.*

51. VENTURA, *supra* note 48.

52. *Id.* at 108-09.

53. *Id.* at 105.

54. Shoemaker, *supra* note 3.

55. *Id.*

56. *Id.*

One of those three wrestlers, Kanyon, passed away after the lawsuit, but a 2012 article from the Bleacher Report revealed some of the details of his 2002 WWE contract.⁵⁷ Some of the more eye-opening parts of the contract included:

- A clause that following the wrestler's death, "no further compensation due [to] [any] WRESTLER's heirs [or] successors . . .";
- That "the promoter [WWE] cannot be sued or held liable if . . . wrestler is seriously injured or die[d], 'whether caused by the negligence of the PROMOTER, other wrestlers or otherwise'";
- If a wrestler cannot "wrestle for eight (8) consecutive weeks . . . due to an injury suffered in the ring . . . , [the] PROMOTER . . . [had] the right . . . to terminate [the] Agreement or suspend [the] WRESTLER without pay"; and
- That if a wrestler wanted to appear in any other works, he or she must seek permission from the promoter, and "pay the company a 10 percent management fee, [with] 'all monies earned . . . from such [appearance] credited against the Minimum Annual Compensation for that Contract Year.'"⁵⁸

Just like other professional sports, or other professional contracts in any area, they can vary wildly from one wrestler to another. Different wrestlers have different clauses and different incentives based on such things as merchandise sales, number of appearances, pay-per-view buy rates, and other factors. However, it has been a routine practice of WWE, at least as much as the wrestling public has been informed, that almost every contract is exclusive and does not allow wrestling for other promotions.⁵⁹

The one-sided clauses of Kanyon's contract led the author of the piece to campaign for unionization, which is also supported by others and some former WWE superstars, such as WWE Hall Of Fame member Bret Hart.⁶⁰ Such issues as medical care, training, contractual issues, and many others are areas in which wrestlers do not currently have any representation concerning.⁶¹ Yet, despite the call for unionization from the outside, there has been no talk of unionization from anybody currently employed by the WWE.⁶²

57. Sonneveld, *supra* note 6.

58. *Id.*

59. Telephone Interview with Chris Estes, *supra* note 39.

60. *Id.*

61. *Id.*

62. *Id.*

When considering the unique industry that is professional wrestling, and the unique monopolist-like position that the WWE has over the industry, the wrestlers are hard to blame for being scared to unionize. Without adequate support, it could cause fear that they will lose their jobs and livelihood for the future. However, with help from the National Labor Relations Act and the National Labor Relations Board, it is something they could, and arguably should consider doing to improve their current and future employment situation and health and wellness outlook as they progress in life.

Several decisions from the courts and the National Labor Relations Board have been over the issue of who is an “employee” and who is an “independent contractor.” That issue is at the heart of whether professional wrestlers could unionize.

III. THE NATIONAL LABOR RELATIONS ACT AND THE EMPLOYER VS. INDEPENDENT CONTRACTOR BATTLE

A. The National Labor Relations Act

The National Labor Relations Act (NLRA) is the document that governs labor relations in the United States. It is enforced by the National Labor Relations Board (NLRB), who issues decisions on labor related issues.⁶³ If one wanted to file a charge with the NLRB, they would first allege an “unfair labor practice” on the part of the other party with a regional director.⁶⁴ This would lead to an investigation by the regional office of the NLRB.⁶⁵ The investigation could lead to an injunction, a withdrawal by the regional director, or a complaint and answer.⁶⁶ A complaint and answer would then lead to either an injunction, withdrawal, or a hearing and decision in front of an Administrative Law Judge (ALJ).⁶⁷

Outlining the process of the NLRB is a way of showing that once a charge is filed, it still has a long way to go before any decision is ordered in finding an unfair labor practice. Therefore, an understanding of the relevant sections of the NLRA is necessary to craft a well-informed charge of any type of unfair labor practice.

63. *The NLRB Process*, NAT’L LABOR RELATIONS BD., <http://www.nlr.gov/resources/nlr-process> (last visited Dec. 13, 2018).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

When considering if a group of workers can unionize, they first must be found as “employees” under Section 2(3) of the NLRA.⁶⁸ That section defines “employee” as “any employee, and shall not be limited to the employees of a particular employer”⁶⁹ While that is a broad definition, it does exclude certain types of employees, such as independent contractors, which is where the analysis for this issue will be addressed later.

If potential unionizers are found to be employees, then they are afforded certain guaranteed rights under the NLRA. Section 7 of the NLRA states that “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”⁷⁰ Along with those guaranteed rights, they also may refrain from any of those activities as long as it does not conflict with the membership in a labor organization or a condition of employment.⁷¹

Further, an employer cannot interfere with those guaranteed Section 7 rights. Under Section 8, the NLRA states that:

It shall be an unfair labor practice for an employer -- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; [or] (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it⁷²

These first two parts of Section 8 broadly state that employers must allow all of their employees to exercise their Section 7 rights and may not interfere with them.

Section 8 goes on by stating, under subsection 3, that it is an unfair labor practice for an employer “[B]y discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization”⁷³ Section 8 forbids an employer, under subsection 4, “to discharge or otherwise discriminate against an employee because he has filed charges or given

68. National Labor Relations Act § 1 [29 U.S.C. § 151] (2018).

69. *Id.*

70. *Id.* § 7 [§ 157].

71. *Id.*

72. *Id.* §§ 8(a)(1)-(2) [§§ 158(a)(1)-(2)].

73. *Id.* § 8(a)(3) [§ 158(a)(3)].

testimony under this Act,”⁷⁴ and, finally, under subsection 5, “to refuse to bargain collectively with the representatives of his employees”⁷⁵

Section 8 of the NLRA serves as the enforcement of the Section 7 rights that employees are guaranteed under the act. For those who are employees to enjoy the Section 7 rights, however, they must be determined to be “employees” under Section 2(3). This determination has led to various NLRB decisions and court cases that pit workers against employers in a dispute over whether the workers are employees or are defined as something else, such as an independent contractor.

B. Case Law Concerning “Employee” Status

Courts and the NLRB have dealt with the NLRA and the various sections discussed to give a better idea of who exactly the Act covers and what it covers. The purpose of the Act is to “improve labor relations... in large part by granting specific sets of rights to employers and to employees.”⁷⁶ The clarification of these rights, based on definitions of words such as “employee,” have led to numerous challenges.

Various cases or decisions with situations much like the situation of professional wrestlers attempting to form a union have found “employee” status, while others with different sets of facts have found “independent contractor” status. This is the most important designation concerning this issue. If WWE wrestlers are considered employees, they can unionize, if they are considered independent contractors, they cannot. An examination of the different decisions by the courts and the NLRB is necessary to see how they have differentiated between the two and how the factors used could apply to WWE wrestlers if they were to rally support and attempt to unionize.

1. Cases in Which Petitioners Were Found to be “Employees”

A recent NLRB decision found drivers who lease their trucks from the respondent company were employees, while the drivers who owned their own trucks were potentially not.⁷⁷ The case concerned the employer, Intermodal Bridge Transport, engaging in what the Board called a “pattern of attempting to manufacture a record that would color the facts in its favor.”⁷⁸ The company, in mid-2014, changed the forms that the drivers signed from a “Drivers

74. *Id.* § 8(a)(4) [§ 158(a)(4)].

75. *Id.* § 8(a)(5) [§ 158(a)(5)].

76. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 88 (1995).

77. *Intermodal Bridge Transp. & Int’l Bhd. of Teamsters*, 2017 N.L.R.B. LEXIS 577, *47 (2017).

78. *Id.* at *22.

Application for Employment” to what they called an “Independent Contractor Application,” while requiring the existing drivers to transfer information from their old application to the new independent contractor application.⁷⁹ IBT then destroyed the old application, purging it from the driver’s files, leaving only the newly signed “independent contractor application” which was signed by the employees after they had already worked at IBT for some amount of time under the impression they were employees.⁸⁰

The NLRB stated that the party seeking to exclude individuals performing services for another from the protection of the Act on the grounds that they are independent contractors has the burden of proving that they are in fact, independent contractors.⁸¹ They then relied on a “non-exhaustive” list of factors from the Restatement (Second) of Agency Section 220, known as the “right to control” test.⁸² These factors, while non-exhaustive, are guiding principles in determining employee status. All of the factors “must be assessed and weighed, with no one factor being decisive.”⁸³ The factors include:

- (1) [T]he extent of control over the details, means and manner of the work;
- (2) whether the putative contractor is engaged in a distinct occupation or business;
- (3) whether the work is done under the direction of the principal, or by a specialist without supervision;
- (4) the skill required;
- (5) who supplies the tools and place of work;
- (6) the length of time for which the person is employed/contracted;
- (7) the method of payment, whether by the time or by the job;
- (8) whether the work is part of the regular business of the employer;
- (9) whether the parties believe they are creating an employment or contractual relationship; and
- (10) whether the principal is in the same business.⁸⁴

The court ended up finding that IBT had “engaged in an unfair labor practice affecting commerce within the meaning of . . . the Act.”⁸⁵ They misclassified their employees as independent contractors, when in actuality, they were employees.⁸⁶ They found this by balancing all of the factors above

79. *Id.*

80. *Id.* at *23.

81. *Id.* at *24-25.

82. *Id.* at *25.

83. *Id.* at *26.

84. *Id.* at *25-26.

85. *Id.* at *78.

86. *Id.*

and determining they weighed more favorably on the side of the drivers being employees.⁸⁷

Two other decisions in which the Board found employee status for the workers was the *Roadway* decision in 1998 and the *FedEx* decision from 2014.

Roadway had made changes to their operation following a 1994 NLRB finding that their Ontario and Pomona drivers were, in fact, employees, not independent contractors.⁸⁸ These changes, which included such things as now giving drivers a proprietary interest in their areas, no longer maintaining forms for the drivers to lease or purchase vehicles, or other such things, did not change the mind of the NLRB.⁸⁹ They decided to uphold their previous decision that the drivers were employees, and not independent contractors as Roadway had hoped, for purposes of the act.⁹⁰

Factors found to be in favor of employee status included that no evidence showed the drivers used their trucks for any other commercial purpose other than hauling for Roadway, and those trucks had to meet precise specifications that were established by Roadway.⁹¹ Roadway also established different packages of incentives that the drivers could choose from, which showed a form of control over the drivers.⁹²

The Board then applied the common-law agency test and found that the factors added up to a showing that the drivers did “not operate independent businesses, but perform functions that are an essential part of one company’s normal operations”⁹³ They also found that the drivers:

[Did] not need to have any prior training or experience, but receive[d] training from the company; they [did] business in the company’s name . . . ; . . . [did] not ordinarily engage in outside business; . . . constitute[d] an integral part of the company’s business under its substantial control; . . . [had] no substantial proprietary interest beyond their investment in their trucks; and . . . [had] no significant entrepreneurial opportunity for gain or loss.”⁹⁴

87. *Id.* at *26-27.

88. *Roadway Package Sys., Inc.*, 326 N.L.R.B. 842, 843 (1998).

89. *Id.*

90. *Id.*

91. *Id.* at 844.

92. *Id.* at 846.

93. *Id.* at 851.

94. *Id.*

Weighing all of those factors together, the Board concluded that the drivers were employees, and not independent contractors, just as they had found before.⁹⁵

More recently, in 2014, the Board decided that respondent, FedEx, “violated Section 8(a)(5) and (1) of the National Labor Relations Act because it refused to recognize and bargain with the union that represented respondent’s drivers, given that such respondent’s drivers were employees covered under Section 2(3) of the Act.”⁹⁶ The Board in FedEx used the same sort of factor analysis as they did in *Roadway*, weighing such factors as:

[t]he extent of control which . . . the master may exercise over the details of the work[:]; . . . [w]hether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work[:]; . . . [w]hether or not the work is part of the regular business of the employer[:]; [and] [w]hether or not the parties believe they are creating the relation of master and servant.⁹⁷

They also considered an additional factor, which was: “whether the evidence tends to show that the drivers render services to FedEx as part of their own, independent businesses.”⁹⁸ They found that FedEx did not carry the burden to show that the drivers were independent contractors, as the factors weighed heavily in favor of an employer/employee relationship between the company and the drivers.⁹⁹

There have been, however, other decisions by the NLRB that, by using the common law right to control test, they determined that the workers were independent contractors rather than employees.

2. Cases in Which Petitioners Were Found to be Independent Contractors

In 1998, the NLRB decided that *Dial-A-Mattress* drivers, who made deliveries for the company, while hiring his or her own employees, having sole and complete responsibility for them, and setting all terms and conditions of employment for them, were independent contractors under the meaning of the Act.¹⁰⁰

95. *Id.*

96. FedEx Home Delivery, 2014 N.L.R.B. LEXIS 753, *1 (2014).

97. *Id.* at *8-9.

98. *Id.* at *85.

99. *Id.* at *84.

100. Dial-A-Mattress Operating Corp. & Local 363, 326 N.L.R.B. 884, *891 (1998).

The Dial-A-Mattress drivers used trucks that they owned, and hired their own employees who they had sole control and complete responsibility for.¹⁰¹ Dial-A-Mattress placed no requirements on the trucks, such as model, make, color, size, or condition.¹⁰² The drivers set their own schedules, human resources had no responsibility for the drivers, and there was no type of progressive disciplinary system applicable to the drivers.¹⁰³

The Board found that the drivers had “a separate identity” from Dial-A-Mattress and “[t]he contracts executed by the owner-operators contain[ed] several provisions that reflect [their] . . . independence” from Dial-A-Mattress.¹⁰⁴ They distinguished this from Roadway by stating that Roadway provided their “drivers with a vast array of support plans to reduce risk in the performance of their deliveries and pickups for Roadway,” while Dial-A-Mattress did not.¹⁰⁵ They also distinguished the differences in the truck requirements, whereas Roadway had a number of restrictions placed on the trucks the drivers drove, Dial-A-Mattress essentially had none.¹⁰⁶

More recently, in 2005, the NLRB found newspaper carriers and haulers for the St. Joseph News-Press were independent contractors when they applied the standards of Roadway Package System and Dial-A-Mattress.¹⁰⁷

The newspaper carriers signed a contract that expressly described them as independent contractors and prohibited them from displaying the respondent’s insignia while delivering the newspapers.¹⁰⁸ The Board applied the *Roadway* and *Dial-A-Mattress* factors and found that “the degree of control exercised [by the respondent] in the instant case is demonstrably less and akin to that exercised by the employer in *Dial-A-Mattress*.”¹⁰⁹ The Board also found it significant that, like in *Dial-A-Mattress*, the newspaper carriers were “neither subject to discipline nor subject to the Respondent’s employee handbook or other work rules.”¹¹⁰

When the Board weighed the factors in these cases that differentiate between employees and independent contractors, they found that the workers were independent contractors. Just as evidenced above, it is always a balancing

101. *Id.* at *885.

102. *Id.* at *886.

103. *Id.* at *888.

104. *Id.* at *891.

105. *Id.* at *893.

106. *Id.*

107. St. Joseph News-Press & Teamsters Union Local 460, 345 N.L.R.B. 474, 480 (2005).

108. *Id.* at 490.

109. *Id.* at 478.

110. *Id.* at 479.

test that requires a full examination of all the circumstances. Besides professional wrestling, there have been other areas of athletics that have considered unionization, and the answers to the question of if the athletes are employees remains murky.

*C. College Athletes and Cheerleaders: Other Areas of Sport Where
Unionization Is an Issue*

Some other areas of athletics have had their own battles over unionization. One such area is NFL cheerleaders. In 1995, the NLRB's Regional Director determined that the Buffalo Bills, the cheerleaders for the Buffalo Bills, were employees and affirmed their right to vote to form a union.¹¹¹ However, this was later reversed, despite the fact that under the common law right to control test, the cheerleaders would appear to be employees, with their strongest argument being the "amount of control the NFL franchises have over every detail in a cheerleader's life."¹¹² If found to be employees, it would later lead to further argument over whether the cheerleaders are seasonal or temporary employees, which are not covered under the NLRA.¹¹³

Regardless of the seasonal or temporary question, cheerleaders would need to be evaluated under the right to control test, which would lead to further evaluations of the differences between employees and independent contractors in the athletics arena. With the amount of control that NFL teams have over cheerleaders, it is likely, under the right to control test, that they would be found to be employees.

More recently, college athletes, specifically football players, attempted to unionize at Northwestern University. In 2015, the NLRB declined to assert jurisdiction because they did not believe it would promote stability in labor relations.¹¹⁴ However, when considering their reasoning, not everyone agreed with the Board's conclusion. One commenter argued that the "NLRB's decision was not appropriate because it slows innovation and progress in college football. Despite the Players' risk of physical injury, they do not have a voice regarding the terms and conditions of their participation in the sport."¹¹⁵

111. Claudia Harke, Comment, *Pom Poms, Pigskin & Jiggle Tests: Is It Time for the National Football League Cheerleaders to Unionize?*, 30 WIS. J.L. GENDER & SOC'Y 157, 170 (2015).

112. *Id.* at 177.

113. *Id.* at 178.

114. Northwestern Uni. & Coll. Athletes Players Ass'n, 2015 N.L.R.B. LEXIS 613, *1 (2015).

115. Joseph A. Dempewolf, Comment, *Throwing the Red Flag: A Review of the NLRB's Fumbled Decision Regarding Collegiate Football Players as Employees* [Northwestern Univ., 362 N.L.R.B. No. 167 (Aug. 17, 2015)], 55 WASHBURN L.J. 789, 815 (2016).

The common law definition of “employee,” as well as the right to control test, would seem to lead to the conclusion that college football players are employees; however, other issues, such as state laws, affect this evaluation of college athletics, and are not relevant to the question of whether professional wrestlers could unionize.

These two areas of athletics, cheerleaders and college athletes, serve to illustrate that the issue of whether workers are employees or independent contractors under the right to control test is never cut and dry and takes careful evaluation of all of the surrounding circumstances of the situation.

IV. ANALYSIS

Under the NLRA and the definitions set forth in the Act, as well as the discussed cases which helped to define who is considered an employee under the right to control test, WWE wrestlers would be considered employees and could exercise their right to unionize.

Using the “common law right to control test,” as discussed, the WWE has extensive control over its employees. The WWE controls almost every aspect of the wrestler’s life. Using the court’s analysis from the *FedEx* decision and the *Intermodal Bridge Transport* decision, it seems clear that the wrestlers are closer to employees than independent contractors.

The first factor from the right to control test, as examined in the *FedEx* decision, is the “extent of control which, by the agreement, the master may exercise over the details of the work.”¹¹⁶ The WWE controls the details of the work done by the wrestlers to a great extent. They tell them where to go, when to be there, and how the near future of their on-and-off-screen careers will pan out.

“Whether or not the one employed is engaged in a distinct occupation or business” is the second factor.¹¹⁷ The WWE is very clearly a distinct occupation or business. It is the most well-known professional wrestling brand in not only America, but it is also known worldwide as the flagship brand of professional wrestling.

The third factor in the test is the “kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer” in the particular occupation.¹¹⁸ Again, much like the first factor,

116. *FedEx Home Delivery*, 2014 N.L.R.B. LEXIS 753, *8 (2014) (reconsideration denied by *FedEx Home Delivery*, 2015 N.L.R.B. LEXIS 164 (2015; vacated by and enforcement denied by *FedEx Home Delivery v. NLRB*, 2017 U.S. App. LEXIS 3826 (D.C. Cir. 2017)).

117. *Id.*

118. *Id.*

almost all of the work done by WWE wrestlers is done at the direction of the company. This includes not only performing at events, but also promotional appearances.

Fourth, is the “skill required in the particular occupation.”¹¹⁹ Professional wrestling is a highly skilled profession that requires years of training and an attention to detail each and every night that protects both the individual performer, and their opponent from a wide array of serious injuries that could result. Unskilled workers could result in a loss of numerous stars to injuries because of the physical nature of wrestling.

Next is “whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.”¹²⁰ While the wrestlers bring their own unique skill set to their job, the WWE provides the tools (the ring, the airtime, etc.) and the place of the work being done. It would be hard to argue that the WWE does not provide the instrumentalities, tools, and place of work.

The sixth factor is the “length of time for which the person is employed.”¹²¹ This is the first factor that could potentially weigh in favor of the WWE. The contracts of wrestlers can vary. They may be relatively short, which could lean towards independent contractor status.¹²²

Seventh is the “method of payment, whether by the time or by the job.”¹²³ Most contracts are by time, although some have included clause for other jobs, such as promotional appearances, and bonuses for things relating to buy rates of pay-per-views or merchandise sales bearing the wrestler’s name.¹²⁴

The eighth factor is “whether or not the work is part of the regular business of the employer.”¹²⁵ Clearly, the work done by the wrestlers, which includes all of the matches and promos themselves, as well promotional events, interviews, and other charitable events, are all part of the regular business of the WWE. Without the wrestlers, there is no WWE.

Ninth is “whether or not the parties believe they are creating the relation of master and servant.”¹²⁶ Although this is often alluded to on TV, and although the workers sign a contract knowing they are designated as independent

119. *Id.*

120. *Id.*

121. FedEx Home Delivery, 2015 N.L.R.B. LEXIS 164, *8 (2015).

122. Telephone Interview with Chris Estes, *supra* note 39.

123. FedEx Home Delivery, 2015 N.L.R.B. LEXIS 164, *8.

124. Telephone Interview with Chris Estes, *supra* note 39.

125. FedEx Home Delivery, 2015 N.L.R.B. LEXIS 164, *8.

126. *Id.* at *8-9.

contractors, they are also aware that the WWE is their boss and they are the employee.

The final non-exhaustive factor that the Board outlined is “whether the principal is or is not in the business.”¹²⁷ Here, the principal is in the business.

The wrestlers put their body on the line night after night, with no off-season. By applying their employment situation to the right to control factors outlined from the *FedEx* case, the factors weigh heavily to employee status.

V. CONCLUSION

The professional wrestling business has shifted from a territorial industry to a centrally based industry revolving around one major company, the WWE. The wrestlers themselves have become locked into performing for one company as their contractual employee, instead of as an independent contractor who travels from one territory to another. They no longer work with different promoters and different wrestlers to cater to that specific territory.

By using the right to control test and weighing the factors, the wrestlers are now employees, as defined by the NLRA, and they should unionize. Unionization would provide the wrestlers with job security, health care benefits, and greater worker’s rights than they are currently enjoying under the “independent contractor” model. A professional wrestling union would be good for the wrestlers both in the short term, and in the long term to provide a more secure future for the wrestlers. While it may be a scary proposition to band together to unionize and collectively bargain with the boss, Vince McMahon and the WWE, it is something that must be done for the good of both the wrestlers and the professional wrestling industry. When millions of viewers tune in for WrestleMania, SummerSlam, Survivor Series, and Royal Rumble, they should be tuning in to see their favorite superstars putting their bodies on the line and knowing that they are protected by a professional wrestling union.

127. *Id.* at *9.